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Zafari bin Md Yunus v Public Prosecutor

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HIGH COURT (IPOH) — CRIMINAL APPLICATION NO AA-43-2-02
OF 2017
ANSELM FERNANDIS JC
25 APRIL 2017

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Criminal Procedure — Police investigation — Remand — Whether remand orders made without sufficient cause — Whether provisions of s 117 of the Criminal Procedure Code complied with — Criminal Procedure Code ss 117 & 323

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The appellant was detained through a remand order granted by the magistrate for four days, that was, between 22–25 December 2016 ('the said detention') as he was allegedly recorded the complainant bathing using a hand phone. The appellant claimed that the remand was based on false allegations in a police report due to a feud between him and the complainant. Hence, the appellant applied to the High Court to revise the remand order made under s 323 of the Criminal Procedure Code ('the CPC') on the basis that there were no valid grounds for the appellant to be remanded in the first place. The issues for determination were: (a) whether the remand was made without sufficient cause before the magistrate; and (b) whether the provisions of s 117 of the CPC were complied with.

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Held, allowing the application and setting aside the remand order:

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(1) A perusal of the remand application gave an impression that there was no investigation done before the remand application was made as there was nothing in the record of the proceedings to indicate this. Also, the reasons stated in the remand application were too general. There was nothing reflected in the remand application in the form of an investigation to give the magistrate reasonable basis for a remand order to be issued against the applicant (see paras 9 & 13).

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(2) The investigation officer did not transmit a copy of the entries in a diary to the magistrate as required in s 117(1) of the CPC. The court was of the view that, this itself rendered the remand to be unlawful as it had deprived the magistrate of taking into consideration any period of detention, if any, immediately prior to the remand application. Therefore, the magistrate had not considered an important factor which he ought to have considered in his decision to further the remand (see paras 20–21).

- (3) Upon perusal of the submissions and record of proceedings, the court held that there was insufficient cause for the magistrate to grant the remand order and there was also serious non-compliance with s 117 of the CPC which had rendered the remand order to be unlawful (see para 23).

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[Bahasa Malaysia summary]

Perayu telah ditahan melalui perintah reman yang diberikan oleh majistret selama empat hari, iaitu, antara 22–25 Disember 2016 ('tahanan tersebut') kerana dia dikatakan telah merekod pengadu mandi dengan menggunakan telefon bimbit. Perayu telah mengatakan bahawa reman tersebut adalah berdasarkan dakwaan palsu dalam laporan polis yang berpunca daripada pergaduhan antara dia dengan pengadu. Oleh itu, perayu telah memohon daripada Mahkamah Tinggi untuk menyemak semula perintah reman yang dibuat di bawah s 323 Kanun Tatacara Jenayah ('Kanun') atas dasar bahawa tiada alasan yang sah untuk menahan perayu pada mulanya. Isu-isu untuk dipertimbangkan sama ada perintah reman tersebut adalah sah di sisi undang-undang adalah: (a) sama ada perintah reman tersebut dibuat tanpa sebab yang mencukupi di hadapan mahkamah majistret; dan (b) sama ada peruntukan s 117 Kanun telah dipatuhi.

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Diputuskan, membenarkan permohonan dan mengenenpikan perintah reman:

- (1) Penelitian permohonan reman memberikan gambaran bahawa tidak ada penyiasatan dijalankan sebelum permohonan reman dibuat kerana tiada apa-apa dalam rekod prosiding yang menunjuk hal ini. Selain itu, sebab-sebab yang nyata dalam permohonan reman adalah terlalu umum. Tiada apa-apa yang terkandung dalam permohonan reman itu dalam bentuk suatu penyiasatan untuk memberikan majistret alasan yang kukuh untuk memberikan suatu perintah reman terhadap pemohon (lihat perenggan 9 & 13).
- (2) Pegawai penyiasat tidak menghantar salinan entri dalam diari kepada majistret seperti yang dikehendaki oleh s 117(1) Kanun. Mahkamah berpendapat bahawa, hal ini telah menyebabkan reman tersebut menyalahi undang-undang kerana telah menafikan majistret dalam mengambil kira mana-mana tempoh tahanan, jika ada, dengan segera sebelum permohonan reman. Oleh itu, majistret tidak mempertimbangkan satu faktor penting yang dia harus pertimbangkan dalam keputusannya untuk melanjutkan reman (lihat perenggan 20–21).
- (3) Setelah menyemak hujahan dan rekod prosiding, mahkamah telah memutuskan bahawa tiada sebab yang mencukupi untuk majistret memberikan perintah reman tersebut dan juga terdapat ketidakpatuhan s 117 Kanun yang serius yang mengakibatkan perintah reman tersebut

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- A menyalahi undang-undang (lihat perenggan 23).]

Notes

For cases on remand, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3465–3470.

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Cases referred to

Ketua Polis Daerah Johor Bahru, Johor & Ors v Ngui Tek Choi [2013] 4 MLJ 504; [2013] 4 CLJ 47, CA (refd)

- C *Leonard Teoh Hooi Leong v PP* [2010] 3 MLJ 373, CA (refd)
 Mohd Hady bin Ya'akop v Hassan bin Marsom & Ors [2016] 4 MLJ 141, CA (refd)
 PP v Audrey Keong Mei Cheng [1997] 3 MLJ 477; [1997] 4 CLJ 702, CA (refd)
D *PP v Rajisegar a/l Munisamy* [2006] 2 MLJ 43, CA (refd)

Legislation referred to

Criminal Procedure Code ss 117, 117(1), (2), (3), (4), (5), 119, 119(1), 323, 323(1), 325

- E *Harris Ong Mohd Jeffrey Ong (Deputy Public Prosecutor, Attorney General's Chambers) for the public prosecutor.*
 Vernal (Kala Malar with him) (Kula & Assoc) for the accused.

- F **Anselm Fernandis JC:**

INTRODUCTION

- G [1] This matter was brought to this courts attention by virtue of a letter from the applicant solicitors dated 27 January 2017. Briefly the letter complained that the remand of the applicant, one Zafari bin Md Yunus was based on false allegations in a police report. This was due to a feud between him and the complainant. It was also stated in the said letter that the applicant's statement was only recorded once in the four days he was under remand. He was remanded from 22–25 December 2016. The applicant applied to the High Court to revise the remand order under s 323 of the Criminal Procedure Code ('the CPC') stating that there were no valid grounds for the applicant to be remanded in the first place. This court then called for the record of proceedings in accordance with s 323(1) of the CPC.

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BACKGROUND FACTS

[2] The pertinent facts leading to the remand of the applicant are as follows:

- (a) a police report was lodged by the complainant stating that an unknown person had used a hand phone to record her bathing. This alleged incident occurred on the 29 November 2016 and the said report was lodged the following day. Based on this report, the applicant was arrested on the 21 December 2016. On the 22 December 2016, he was brought to the magistrate to be remanded under s 117 of the CPC; and
- (b) the investigating officer ('IO') made the remand application by way of a type written letter signed by him entitled 'MOHON PERINTAH REMAN DIBAWAH SEK 117 KPJ' ('the remand application'). In it the IO requested that the applicant be remanded for four days, that is, from 22–25 December 2016. The reasons for the remand were stated as:
- i. Merakam percakapan 112 OYDS.
 - ii. Mengambil gambar dan cap jari.
 - iii. Merakam percakapan risikan ke atas OYDS.
 - iv. Membuat siasatan mengenai penglibatan OYDS dalam kes ini.
- The notes for the remand proceedings were hand written in what appeared to be a standard form headed 'MINIT PERMOHONAN REMAN DI BAWAH SEKSYEN 117 KANUN PROCEDURE JENAYAH' ('the form') and was signed by the magistrate. A fully typewritten transcript of the same with the heading 'LAMPIRAN A' ('the typewritten transcript') was also made available. All three documents formed the record of the proceedings which was forwarded to this court.

SCOPE OF S 325 OF THE CPC

[3] In exercising my powers under s 325 of the CPC, I had to satisfy myself as to the 'correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of the inferior court'. I then would have to examine the record of the proceedings of which had been called for. In exercising this discretion, I confined myself only to the record of the proceedings and nothing else. *Public Prosecutor v Audrey Keong Mei Cheng* [1997] 3 MLJ 477 at pp 482–483; [1997] 4 CLJ 702 at p 709 (CA).

[4] From the onset, I would therefore make it clear that this proceeding is only concerned with the lawfulness of the remand order.

SUBMISSION BY PARTIES

[5] The learned DPP submitted that the order granted by the magistrate was a lawful order as the magistrate had the legal authority to make such an

A order. In other words, it was part of a judicial act. Learned counsel for the applicant on the other had argued that the remand order was made without any basis as there was no evidence at the time of the application to link the applicant with the said police report. Counsel also submitted that there was a breach of s 117 of the CPC which rendered the remand unlawful.

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ISSUES TO CONSIDER

C [6] In determining whether the remand order was lawful or not I would have to address myself as to whether it was made either without sufficient cause being placed before the magistrate or against the provisions of s 117 of the CPC.

D [7] On the point raised by the learned DPP it is my opinion that although it is clear that the remand order is the result of an act of judicial authority this court can determine the legality or propriety of the remand order. In fact, the very lawfulness of the order is being challenged here.

E [8] This issue was considered in the Court of Appeal in the case of *Ketua Polis Daerah Johor Bahru, Johor & Ors v Ngui Tek Choi* [2013] 4 MLJ 504; [2013] 4 CLJ 47 where it was clearly stated:

F Since the issue of a remand order under s 117 of the CPC was an exercise of a Magistrate's criminal jurisdiction, the relevant High Court which has the jurisdiction to set aside the order is a High Court exercising its criminal, appellate or revision power under the CPC and the Courts of Judicature Act 1964.

WAS THE REMAND MADE WITHOUT SUFFICIENT CAUSE
BEFORE THE MAGISTRATE?

G [9] The reasons for the remand application are as stated in para 2(b) above. There were no other reasons stated for the applicant to be remanded. On seeing how general the reasons were couched in, one cannot help having the impression that there was no investigation done before the remand application was made. Indeed, there was nothing in the record of proceedings to indicate this. The Court of Appeal had recently considered the question of whether there was sufficient cause for issuing a remand order. In the case of *Mohd Hady bin Ya'Akop v Hassan bin Marsom & Ors* [2016] 4 MLJ 141 at p 150 the Court of Appeal commented:

I It was undeniable that there were two remand orders issued under s 117 of the CPC which covered the whole period of the appellant's detention in police custody, and arguably legitimised the appellant's detention. *The crucial question however, in our minds, was whether those remand orders had been obtained from the magistrate(s) upon sufficient cause being shown or whether the judicial officers concerned had been misled in*

issuing the remand orders when there were no well-founded grounds to secure those orders in the first place. (Emphasis added.)

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[10] In the above case the Court of Appeal was considering whether the magistrate was misled in granting the remand order. It is this court's view that in considering whether there were 'well founded grounds' for a remand order to be made I could also consider the absence or lack of such grounds.

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[11] On scrutinising ss 117 and 119 of the CPC one would envisage some form of investigation having taken place, albeit preliminary, before 'any person is arrested and detained in custody'. A perusal of the remand application in this case however gives a contrary impression. Such investigation, if carried out, would have formed a basis for the magistrate to grant a remand if investigations cannot be completed within 24 hours.

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[12] Sections 117 and 119 of the CPC, in so far as is material for determination of the issue at hand is reproduced below:

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117 Procedure where investigation cannot be completed within twenty-four hours.

- (1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 *and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a Magistrate a copy of the entries in the diary* hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.
- (2) The Magistrate before whom an accused person is produced under this section may, whether he has or has no jurisdiction to try the case, authorize the detention of the accused in such custody as follows:
 - (a) ...
 - (b) ...
- (3) The officer making the investigation shall state in the copy of the entries in the diary referred to in subsection (1), any period of detention of the accused immediately prior to the application, whether or not such detention relates to the application.
- (4) The Magistrate, in deciding the period of detention of the accused person, shall take into consideration any detention period immediately prior to the application, whether or not such detention relates to the application
- (5) ...
- (6) ...
- (7) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing. (Emphasis added.)

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- A 119 Diary of proceedings in investigation:
- (1) Every police officer making a police investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary setting forth —
- B (a) the time at which the order, if any, for investigation reached him;
- (b) the time at which he began and closed the investigation;
- (c) the place or places visited by him; and
- C (d) a statement of the circumstances ascertained through his investigation.
- (2) ...
- D [13] I find the facts as stated in the remand application did not link the applicant to the alleged offence. Part of the police report seemed to have been inserted in the remand application where the complainant herself said ‘ada seorang yang tidak saya kenali telah merakam gambar saya’. In other words, there was nothing reflected in the remand application in the form of an investigation to give the magistrate reasonable basis for a remand order to be
- E issued against the applicant.
- F [14] In determining what was necessary to be done by an investigating officer to enable a magistrate to exercise his powers to grant a remand order, I can do no better than to state what was said in the case of *Mohd Hady bin Ya’Akop v Hassan bin Marsom & Ors* [2016] 4 MLJ 141 at p 155.
- G What could be drawn from the above discussion was that a police officer applying for a remand (detention order for further investigation) had a duty to satisfy the magistrate that there were grounds for believing based on credible information that the person arrested was involved in a criminal offence and such investigation could not be completed within twenty four hours; the accusations must be well-founded. What this meant in other words, was that it was the responsibility of such police officer to produce to the magistrate sufficient material that would pass an objective test to show at least the existence of a reasonable basis for the alleged suspicion to
- H justify the remand order to be issued by the magistrate. The entries in the police diaries that had to be produced when applying for the remand order or extension should also advert to the stage and developments in the investigation under way to support the sufficient cause upon which the magistrate would thereupon have to make the far reaching decision to deny one’s liberty for that limited period.
- I [15] Based on the records, I find that there was a dearth of information or grounds for the magistrate to have exercised his discretion in a meaningful and informative manner when making the remand order. The magistrate gave the remand order of four days even though there was an absence of ‘credible information that the person arrested was involved in a criminal offence’.

[16] In this context one must appreciate what the Court of Appeal stated in *Public Prosecutor v Rajisegar all Munisamy* [2006] 2 MLJ 43 that:

... a Magistrate who is called upon to exercise his power under s 117 must act cautiously and with circumspection. The magistrate must not accept *ipsi dixit* of the police officer requesting the remand. The magistrate must anxiously scrutinise the material that is produced and record his reasons for making the order.

[17] The mechanical fashion in which the remand was given is evident in the typewritten transcript para 5, where the magistrate merely stated the reasons for granting the remand as:

OYDS ditahan 4 hari daripada 22/12/16 sehingga 25/12/16 atas alasan permohonan di para 2 dilokap IPD Batu Gajah.

[18] 'Para 2' merely repeats word for word the reasons given in the remand application. It is noted however, for some reason or other, the words 'para 2' and 'IPD Batu Gajah' were not noted down in the form which, it would be fair to assume, is the contemporaneous notes of the proceedings.

[19] Now to the other issue on whether s 117 was complied with.

WERE THE PROVISIONS OF S 117 OF THE CPC COMPLIED WITH?

[20] The most obvious omission as can be discerned from the record of proceedings is that the IO did not transmit to the Magistrate a copy of the entries in a diary as required in s 117(1) of the CPC. As stated earlier the remand application consisted of a sheet of paper in the form of a letter. There were no entries such as those required by s 119 of the CPC. I am of the considered view that this by itself would render the remand unlawful. The remand application in this case could not, by any stretch of the imagination, be said to be the 'diary' contemplated under s 117(1) of the CPC and s 119(1) of the CPC. There are a number of cases on this point but I need only to mention case of *Leonard Teoh Hooi Leong v Public Prosecutor* [2010] 3 MLJ 373 where Court of Appeal in considering whether the detention of the appellant was lawful stated:

In *Re the detention of R Sivarasa & Ors*, KC Vohrah J (as he then was) held that the failure to transmit to the Magistrate a copy of the entries was fatal to the application before the Magistrate as it meant that the Magistrate did not have the prescribed material to act upon her judicial enquiry whether to order for further remand. Similarly, in *Public Prosecutor v Audrey Keong Mei Cheng*, Shaikh Daud JCA held that since the police failed to produce a copy of the diary as prescribed by s 119 of the CPC, the registrar was right to refuse to order further detention of the respondent.

We endorse the above views.

- A [21] Further to this the non-production of the investigation diary would have deprived the magistrate of taking into consideration any period of detention, if any, immediately prior to the remand application. It was mandatory for him to do so under s 117(4). The magistrate had therefore not considered an important factor which he ought to have considered in his
- B decision to further the remand. This section together with sub-ss (2), (3) and (5) were inserted by the Criminal Procedure Code (Amendment) Act 2006. In general, the amendments put in place stricter requirements for the period and conditions of remand and for the officer making the application to specifically state in the diary whether the accused has been previously detained.
- C [22] It cannot be denied that s 117 is an important tool for the enforcement agency. The work of the IO would be greatly hampered without it. Parliament, however, had in all its wisdom passed laws to ensure the rights of the person detained are protected. On the other hand, the manner these laws are
- D administered must not be such as to delay or hinder the progress of an investigation. A magistrate in determining a remand application has to balance the right to liberty of an individual and the imposition of laws that limit his liberty but are crucial for the investigation and detection of crime. In this, the magistrate must ensure that every granting or refusal of a remand application is
- E justifiable and in accordance with the law.

CONCLUSION

- F [23] After listening to the submissions and going through the record of proceedings, I find that there was insufficient cause for the magistrate to grant the remand order. There was also serious non-compliance with s 117 of the CPC, in particular to sub-ss (1) and (4) which rendered the remand order unlawful.
- G [24] The application for revision is therefore allowed and the remand order set aside.

Application allowed; remand order set aside.

- H Reported by Jacqueline Kho

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